85-1601

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.

in the

# Supreme Court

of the

# United States

OCTOBER TERM, 1985

NIGEL WINFIELD,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR ISSUANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Law Offices of
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## QUESTION PRESENTED FOR REVIEW

I.

IS A RIGHT TO A FAIR TRIAL THWARTED WHEN A PROSECUTING ATTORNEY FAILS TO DISCLOSE TO THE TRIAL COURT OR COUNSEL FOR DEFENDANTS THAT HE LEARNED THROUGH THE UNITED STATES MARSHALLS SERVICE THAT:

A) HIS MOST IMPORTANT WITNESS IS COMMITTING PERJURY AND HAS BEEN CITED ON ALLEGATIONS OF CRIMINAL FRAUD.

B) THE RELIABILITY OF THAT WITNESS MAY WELL BE DETERMINATIVE OF GUILT OR INNOCENCE OF THE DEFENDANT.

AND WHEN:

THE SUPPRESSION OF THE INFORMATION CONCERNING THE WITNESS WOULD UNDERMINE CONFIDENCE IN THE OUTCOME OF THE TRIAL.

## LIST OF THE PARTIES TO THE PROCEEDING

Nigel Winfield

Gabriel Robert Caggiano

Raymond W. Baszner

J. Laurence Wolfson (deceased)

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## OPINIONS BELOW

The opinion of the Sixth Circuit, reproduced and attached hereto as Appendix "A", is unreported. The judgment and sentence of the United States District Court, Western District of Tennessee, was entered on September 8, 1982.

## JURISDICTIONAL STATEMENT

The judgment and the opinion of the Sixth Circuit was entered on December 2, 1985. A petition for rehearing and a petition for rehearing en banc were timely filed and an order denying the petition for rehearing and rehearing en banc was filed January 28, 1986. A copy of that order is attached as Appendix "B".

Petitioner invokes the jurisdiction of this Court under Title 28, Section 1254(1) and Supreme Court Rule 17.1 (c).

Rule 17.1(c):

> "(c) When a state court or a federal court of appeals, has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal

question in a way in conflict with applicable decisions of this Court."

## CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

## STATUTORY PROVISION

Title 18, United States Code, Section 2:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels,

commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Title 18, United States Code, Section 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Title 18, United States Code, Section 1343:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or

property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000. or imprisoned not more than five years, or both."

Title 18, United States Code, Section 2314:

> "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000. or more, knowing the same to have been stolen, converted or taken by fraud; or . . ."

## STATEMENT OF THE CASE AND FACT

Petitioner (together with Raymond Baszner, Robert Caggiano, and J. Laurence Wolfson) was charged on November 17, 1978 with four counts of wire fraud, aiding and abetting in wire fraud, conspiracy to commit wire fraud, and transportation of stolen property in interstate property. He was found not guilty on June 15, 1982 of five of the counts, but was found guilty as to count five; Title 18, Section 2314.

Appeals followed.

On December 7, 1983 motions for new trial were filed by Petitioner and the other defendants, basically charging misconduct in not revealing perjury, which was committed by the chief prosecutorial witness, Fred Pro.

On May 18, 1984, the motions for new trial were denied.

The appeal of the convictions and the denial of motion for new trial were consolidated. The Sixth Circuit affirmed both the conviction and the denial of the motion for new trial.

This Petition is addressed to the opinion of the United States Court of Appeals for the Sixth Circuit.

* * * * * *

Nigel Winfield is an aircraft broker.

He had sold planes to and for Elvis Presley. Presley owned an airplane known as a Lockheed Jetstar which he had bought for personal uses.

At the time of the events involved in this case, a great deal of money was owed on the plane to the American National Bank of Morristown, New Jersey. Foreclosure was imminent.

Vernon Presley, Elvis' father, was handling all the business affairs concerning the plane and negotiations for proposing financing.

Vernon Presley devised a plan to save the plane, and turn it into a source of income. The plane was to be sold to a leasing company called W.W.P., and operated by one, Hans Achtman. The purchase price was to be Nine Hundred Fifty Thousand Dollars ($950,000.00). The money was to be secured by Achtman through refinancing with the Chemical Bank of New York, with the plane to be used as collateral.

In order to make the plane worth the loan value, it was intended that the plane would be "upgraded" to permit commercial use after paying off the loan in New

Jersey. The remaining funds, Three Hundred Thirty Eight Thousand Dollars ($338,000.00) would be used in doing the necessary upgrading work.

Presley leased the plane from W. W. P. for a period of seven years, and then in turn subleased to Air Cargo for a period of ten years. Air Cargo was a company owned and operated by a Fred Pro.

The sublease agreement to Air Cargo (Pro) was for One Thousand Dollars ($1,000.00) a month more than the lease from W. W. P. At the end of the seven year lease, the plane was to revert to Presley for One Dollar ($1.00), and the bank would have been paid off.

Under the agreement, Air Cargo was to be responsible for doing the upgrading of the plane. World Aircraft Exchange, Inc. was to be responsible for the supervision of the upgrading. A corporation known as Trans World Industries was to do part of the upgrading. That corporation was controlled by J. Laurence Wolfson.

Neither Winfield nor Commercial Air Transport (Winfield's corporation) was to be paid anything. Winfield, as the broker for the plane, would only receive money after the plane had started producing profits through the arrangement. The agreement was executed.

An addendum to the lease was executed on June 25, 1976.

It provided that W.W.P. would release funds in a specified order.

First, the bank in Morristown, New Jersey would be paid off; then Air Cargo Express would be paid money for upgrading and World Aircraft Exchange would be paid for supervising the upgrading.

It also provided that no fees or commissions would be paid by W.W.P. to Nigel Winfield or Commercial Air Transport Sales.

On July 13, 1976, in accordance with the agreements, invoices were presented for payment.

Winfield was not present.

Presley approved payment of the amounts requested on the invoices.

A check for Three Hundred Thirty Eight Thousand Dollars ($338,000.00) was taken from W.W.P. to Vernon Presley. Six Hundred Thousand Dollars ($600,000.00) was paid to the bank in Morristown, New Jersey.

Presley then directed his banker to make out the checks in payment of the invoices he had been given. Checks were then drawn to Air Cargo Express, Trans World Industries, and World Aircraft Exchange.

No invoices were presented by Winfield or Commercial Air Transport.

No check was drawn or paid to either Winfield or Commercial Air Transport.

At the time the checks were drawn, Fred Pro gave the check payable to Trans World Industries to Winfield in Wolfson's absence.

No testimony was introduced indicating what was done with that check. The checks all cleared. No payment was ever made to Nigel Winfield or his corporation. A check for Forty Thousand Dollars ($40,000.00) was paid by Trans World Industries to one, Ena Winfield.

No evidence was ever introduced identifying Ena Winfield or explaining what that check to Ena Winfield was for.

Since the jury found Winfield not guilty of all conspiracy or mail fraud charges, the evidence related

above is the only evidence pertinent to the Count on which Winfield was found guilty and sentenced.

Fred Pro testified that the defendants had agreed not to do the upgrading. No other witness testified to such an agreement.

## THE MOTIONS FOR NEW TRIAL

On June 1, 1982, the prosecutor, Joe Dycus, knew that a temporary restraining order had been entered against Fred Pro by the Securities and Exchange Commission. Pro was served with that order during a noon break, and while he was testifying as a Government witness.

The order of the Securities Exchange Commission disclosed that Pro was charged with fraud, deception, looting of the assets of companies in Texas, and diverting a One Million Dollar ($1,000,000.00) check belonging to a corporation known as Jet Industries, Inc., to his own constructive possession. That information was shown by an Affidavit attached to the S.E.C.'S temporary restraining order.

It was also revealed that prior to that, in 1981, Pro had then been operating under the name of DeVeau while free from custody under the Witness Protection Program, had looted the assets of a company known as

Electric Car Company and transferred those assets from California to Texas.

Serious concern about Pro/DeVeau and possible renewed criminal activity arose in 1981. Members of the F.B.I. and the U.S. Probation Department were involved from that time on.

A week before he testified in this case, Pro/DeVeau was deposed in San Antonio. At that time, his activities (leading to criminal conviction) were revealed. Present were the F.B.I., U.S. Probation, a member of the U. S. Department of Energy, and others. It was also known that Pro would be testifying in Memphis.

On May 31, 1982, the U. S. District Court in Texas issued the temporary restraining order against Pro, which both Pro and Dycus were aware of while Pro was on the stand in this case.

At the trial, Pro was relied on by the Government as the major witness.

At the trial Pro lied and said that he had not committed criminal acts since his release from custody.

On October 5, 1982, Pro was adjudicated guilty of criminal and civil contempt before the U. S. District

Court in San Antonio and sentenced to serve one hundred seventy-nine (179) days.

He was indicted, tried, found guilty, and sentenced to serve twenty (20) years.

That conviction was for crimes committed after his plea, but before his testimony in this case.

The Assistant United States Attorney trying the case never informed counsel for the defendants or the Court of the information he had received during the time Pro was testifying.

## REASONS FOR GRANTING THE WRIT

### I.

IS A RIGHT TO A FAIR TRIAL THWARTED WHEN A PROSECUTING ATTORNEY FAILS TO DISCLOSE TO THE TRIAL COURT OR COUNSEL FOR DEFENDANTS THAT HE LEARNED THROUGH THE UNITED STATES MARSHALLS SERVICE THAT:

A) HIS MOST IMPORTANT WITNESS IS COMMITTING PERJURY AND HAS BEEN CITED ON ALLEGATIONS OF CRIMINAL FRAUD.

B) THE RELIABILITY OF THAT WITNESS MAY WELL BE DETERMINATIVE OF GUILT OR INNOCENCE OF THE DEFENDANT.

AND WHEN:

THE SUPPRESSION OF THE INFORMATION CONCERNING THE WITNESS WOULD UNDERMINE CONFIDENCE IN THE OUTCOME OF THE TRIAL.

The Court of Appeals for the Sixth Circuit in its opinion made short shrift of the misconduct contention.

> "With respect to the assertion that the government wrongfully withheld information concerning Fredrick Pro's more recent fraudulent activity, contrary to the principles set forth in *Brady v. Maryland*, 373 U.S. 83 (1963) we acknowledge that the issue is not without difficulty. Nevertheless, we are constrained to agree with the trial judge that there is no reasonable probability that had the information in question been disclosed to defense counsel, the result of the proceedings would have been different. See, *United States v. Bagley*, 53 U.S.L.U. 5084 (U.S. July 2, 1985) especially given the extensive defense cross-examination going to the impeachment of Pro during the course of the trial."

The charge of interstate transportation of fraudulently taken checks, knowing they had been secured, through fraud was the only charge on which Petitioner was convicted. He was acquitted of five other counts. The only witness who testified as to knowledge of fraud was Fred Pro. He was the only witness who said that Petitioner had no intention of performing the work for which the check was received. Without his

testimony on that count, no relevant evidence would have been presented.

The cross-examination of Pro was extensive. It was directed at showing that he alone was the culprit. It was directed at showing that he was still engaged in fraudulent activities, doing the same thing he had done in the instant case.

He insisted that though he had done wrong in the past, he had reformed, was honest, and had committed no crimes since imprisonment. He insisted he was telling the truth that day.

> MR. PRO: "I committed a crime and I'm sorry I done it, I wouldn't want to do it again. I don't ever want to commit a crime again." (November 17 - p. 1850-51).
>
> MR. COLLINS ON CROSS: "Mr. Pro, to the best of your present recollection have you been truthful and candid to this court and jury on the question put to you by counsel in this case. . ."
>
> MR. PRO: "Yes." (Vol. 21, p. 23-49)
>
> MR. GRUSMARK: ". . .The difference in this situation is that perjury is now being committed. We are not concerned with past

> acts. He has sworn here today to be telling the truth. If the government knows now, if it knows now that what he has said from the stand is not the truth, it has an obligation to speak up, not to permit perjury to be told to this jury, . . ." (Vol. 19, p. 2097)

The Circuit Court completely overlooked the meaning of *United States v. Bagley*, 105 S.Ct. 3375 (1985). Here, the Assistant U.S. Attorney trying the case, had actual physical possession of a rule to show cause issued by the Securities and Exchange Commission clearly showing Pro's involvement in the same type of criminal activities for which he had been convicted.

The Assistant U.S. Attorney was given that subpoena on the day that Pro began testifying.

He had actual knowledge then that perjury was being committed by Pro.

He did not inform the attorneys for the defendants.

He did not even inform the Court in camera.

* * * * * *

This petition is based solely on *United States v. Bagley*, supra. In the opinion of the Court, in Part I, note 4, p. 3378 it is stated:

> "The Assistant United States Attorney who prosecuted respondent stated in stipulated testimony that he had not known that the contracts existed and that he would have furnished them to respondent had he known of them." See App. to Pet. for Cert. 13a.

Here the Assistant U. S. Attorney did know, but did not furnish the information to Petitioner or even to the Court.

Since Pro was the only witness to the necessary element of knowledge in the transportation charge, his truthfulness was crucial.

As this Court stated in Bagley:

> "Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule. See *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Such evidence is 'evidence favorable to an accused,' Brady, 373 U.S., at 87, 83 S.Ct., at

1196, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) ('The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend').

Information concerning that reliability could not have been more specifically requested.

Here the prosecutor remained silent although he held in his physical possession the precise information requested disclosing Pro's perjury.

It is difficult to see how suppression of Pro's perjury could have been more material.

Part III of Bagley, supra, note 8, at p. 3382 contains the following statements concerning the knowing use of perjured testimony:

". . .In *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed 791 (1935), the Court established the rule that the knowing use by a state prosecutor of perjured testimony to obtain

a conviction and the deliberate suppression of evidence that would have impeached and refuted the testimony constitutes a denial of due process. The Court reasoned that 'a deliberate deception of court and jury by the presentation of testimony known to be perjured' is inconsistent with the 'rudimentary demands of justice.' Id., at 112, 55 S.Ct., at 341. The Court reaffirmed this principle in broader terms in *Pyle v. Kansas*, 317 U.S. 213, 63, S.Ct. 177, 87 L.Ed. 214 (1942), where it held that allegations that the prosecutor had deliberately suppressed evidence favorable to the accused and had knowingly used perjured testimony were sufficient to charge a due process violation.

The Court again reaffirmed this principle in *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). In Napue, the principal witness for the prosecution falsely testified that he had been promised no consideration for his testimony. The Court held that the knowing use of false testimony to obtain a conviction violates due process regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared. The Court explained that the principle that a State may not knowingly use false testimony to obtain a conviction--even

> false testimony that goes only to the credibility of the witness--is 'implicit in any concept of ordered liberty.' Id., at 269, 79 S.Ct., at 1177. Finally, the Court held that it was not bound by the state court's determination that the false testimony 'could not in any reasonable likelihood have affected the judgment of the jury.' Id., at 271, 79 S.Ct., at 1178. The Court conducted its own independent examination of the record and concluded that the false testimony 'may have had an effect on the outcome of the trial.' Id., at 272, 79 S.Ct., at 1178. Accordingly, the Court reversed the judgment of conviction.

In Bagley, supra, this Court repeated a statement made in *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766 (1972):

> "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within the general rule of [Brady]."

The realities of the criminal trial court make it inevitable that the prosecutor must frequently accept the fact that it uses unsavory characters as its witnesses.

It is usually argued that "we cannot find co-conspirators in the churches or the synagogues. But, it is argued "this man has changed, he is today telling the truth."

The argument is probably valid most of the time.

However, what if today he is not telling the truth.

This petition presents the Court with a case where the witness not only had not reformed, but was not telling the truth, and the prosecutor knew it.

## CONCLUSION

It is respectfully requested that this Court issue its Writ of Certiorari so that the case may be briefed and the record may be reviewed.

Respectfully submitted,
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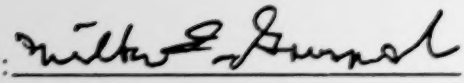
By: 
Milton E. Grusmark

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# Appendix

APPENDIX A

[RECEIVED FEBRUARY 26, 1986]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 82-5573
82-5587
82-5598
84-5488
84-5906

UNITED STATES OF AMERICA,

*Plaintiff/Appellee,*

*versus*

NIGEL WINFIELD,
GABRIEL ROBERT CAGGIANO,
RAYMOND W. BASZNER,

*Defendants/Appellants.*

Appeals from the United States District Court
For The Western District of Tennessee

(December 2, 1985)

Before: ENGEL and MILBURN, Circuit Judges and
CELEBREZZE, Senior Circuit Judge

PER CURIAM:

Raymond W. Baszner, Gabriel Robert Caggiano, and Nigel Winfield appeal their jury convictions in the United States District Court for the Western District of Kentucky for interstate transportation of property and money taken by fraud and aiding and abetting the crime. The defendants also appeal from the district court's order denying their motions for a new trial on the basis of newly discovered evidence.

In October, 1977, Baszner, Caggiano and four other co-defendants were charged in a seventeen-count indictment with mail and wire fraud, interstate transportation of fraudulently obtained property and money, and conspiracy. At an August, 1978 trial on these charges, the jury convicted one defendant but failed to reach a verdict on any count against Caggiano and on eight of the counts against Baszner. The jury acquitted Baszner on one count of mail fraud and two counts of wire fraud. The court declared a mistrial concerning the counts of the indictment on which the jury had been unable to reach a verdict.

On November 17, 1978, a superseding indictment was returned against Baszner, Caggiano, a third original co-defendant named J. Laurence Wolfson, and a new defendant, Nigel Winfield.

The new indictment charged these defendants with essentially the same counts, and did not contain any mail

fraud charges or any of the charges on which Baszner had been acquitted. After several lengthy delays, the defendants went to trial in May, 1982. The jury acquitted each of the defendants on Counts 1, 2, 3, 4, and 7. However, it found Winfield and Wolfson guilty on Count 5 and Baszner and Caggiano guilty on Count 6. Those counts charged interstate transportation of property and money taken by fraud and aiding and abetting the crime. The defendants appealed these convictions.

While the appeals were pending, the defendants discovered evidence that Frederick Pro, a key government witness against them, had perjured himself at the trial. They moved the district court for a new trial based on this newly discovered evidence. A panel of our court granted a motion holding the appeals of their convictions in abeyance, pending resolution of the motions for new trial by the district court. On May 18, 1984, the district court entered an order denying the motions for new trial. Arguments concerning the denial of these motions have been consolidated with the appeals from the convictions.

On appeal the parties raise numerous issues. Winfield argues (1) that there is insufficient evidence to show that he knew that any checks had been taken by fraud, (2) that he was prejudiced by the improper admission in evidence of a check from Trans World Industries to Ena Winfield, and (3) that the finding of not guilty on the conspiracy charge shows that the jury considered improper hearsay testimony in reaching the verdict of guilty on the substantive charge. Caggiano argues (1) that he

was denied his right to a speedy trial, (2) that the trial court improperly excluded hearsay testimony concerning what Vernon Presley would have testified had he been alive at the time of the second trial, and (3) that he was denied due process when the trial court failed to give the jury an Allen charge or modified Allen charge. Baszner contends (1) that he is entitled to a new trial because the government violated the Jencks Act, (2) that it was prejudicial error to allow the prosecution to present the videotaped deposition of Vernon Presley, and (3) that the district court erred in holding that the government was not collaterally estopped from prosecuting the superseding indictment. All three defendants argue that the trial court erred in denying their motions for new trial based upon newly discovered evidence. The government contends that the court of appeals has no jurisdiction over the appeals of Winfield and Baszner from the denial of their motions for new trial because these defendants did not file timely notices of appeal.

Of the several issues presented by the defendants, the most serious are the claim by Caggiano that he was denied his constitutional right to a speedy trial and the claim of all the defendants that their right to a fair trial was fatally impaired by the government's failure to notify defense counsel of Frederick Pro's alleged fraudulent misconduct between the time of the first and the second trials.

With respect to the speedy trial issue, we note that this case was commenced before the effective date of the

sanctions provision of the Speedy Trial Act. 18 U.S.C. Section 3163 (1982). Therefore, we measure the circumstances here against the constitutional standards established by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972). We conclude that under the four-part balancing test of Barker, Caggiano's Sixth Amendment right to a speedy trial was not denied.

With respect to the assertion that the government wrongfully withheld information concerning Frederick Pro's more recent fraudulent activity, contrary to the principles set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), we acknowledge that the issue is not without difficulty. Nevertheless, we are constrained to agree with the trial judge that there is no reasonable probability that had the information in question been disclosed to defense counsel, the result of the proceedings would have been different, see *United States v. Bagley*, 53 U.S.L.W. 5084 (U.S. July 2, 1985), especially given the extensive defense cross-examination going to the impeachment of Pro during the course of trial.

We find no merit to the other claims raised by the defendants.

Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B

[FILED JANUARY 28, 1986]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 82-5573
82-5587
82-5598
84-5488
84-5906

UNITED STATES OF AMERICA,

*Plaintiff/Appellee,*

*versus*

NIGEL WINFIELD,
GABRIEL ROBERT CAGGIANO,
RAYMOND W. BASZNER,

*Defendants/Appellants.*

Appeals from the United States District Court
For The Western District of Tennessee

ON PETITION FOR REHEARING EN BANC

Before: ENGEL and MILBURN, Circuit Judges and
CELEBREZZE, Senior Circuit Judge

PER CURIAM:

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered and upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, CLERK